

Response to Readers of “The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course”*

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To have one’s work read by a panel as esteemed as the one assembled in this symposium is both an honor and a privilege. Only a few additional thoughts come to mind. One, Professor Weinreb is no doubt correct to say that Columbia did not reconfigure its criminal law course simply to re-direct students out of criminal practice. While criminal practice may have gained marginally more recruits from Columbia due to Depression-era freezes in corporate hiring, Wechsler and Michael were primarily interested in using criminal law to redirect students out of private practice and into administrative agencies housed within the rapidly expanding federal state. Then, as now, it was undoubtedly regional, not national schools that supplied the bulk of our nation’s prosecutors and criminal defense attorneys.

However, the question of who actually supplies criminal lawyers raises a more significant point, namely, to what extent law teachers should be concerned with practical training. Even elite institutions like Harvard have struggled with this question. In 2004, for example, Harvard’s First Year Lawyering Program Committee noted that “most lawyers and educators would agree that the more the relatively abstract quality of the first year curriculum can be given additional meaning by relating the substantive courses to what lawyers do, the greater the educational experience.”¹ On this point, several commentators question whether reading more cases would actually better prepare students for practice.² My short answer is that even criminal lawyers need to know how specific offenses work in different contexts, if for no other reason than to help them design charge-bargaining strategies. Further, I agree with Joseph Henry Beale, cases provide students with an opportunity to actively learn the nuance of legal rules, something they would not do if they simply read criminal codes or commercial outlines.

* Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (2009).

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¹ Memorandum from the Comm. on the First Year Lawyering Program to the Faculty of Harvard Law Sch. (Apr. 7, 2004) (on file with author).

² Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 OHIO ST. J. CRIM. L. 257, 257 (2009); Douglas Husak, *Criminal Law Textbooks and Human Betterment*, 7 OHIO ST. J. CRIM. L. 267, 271 (2009); Robert Weisberg, *Did Legal Realism Engage the Real World of Criminal Law?*, 7 OHIO ST. J. CRIM. L. 293, 295 (2009).

For those who remain unconvinced, I have only one point to make. Why continue to use the trappings of the case method, i.e. the casebook, if cases have lost their currency? To me, law teachers should either tell their students they are using the case method, and use it, or abandon it completely and approach their courses in some other way, perhaps modeling their syllabi after political science, sociology, or philosophy classes. Moving away from the casebook entirely, in my opinion, would be the logical conclusion to the “struggle to liberate” the teaching of law from cases that Professor Weinreb mentions in his comment.³ Though many of the commentators in this symposium understand the contours of that struggle, not only because they lived through it but also because they themselves have contributed to it in writing their own case-leavened texts, it is my profound sense that many law professors, particularly young ones, do not realize that Rome has changed hands.

This, to my mind, goes to the core of pedagogy. If we say we are employing a particular method of teaching, then why not remain true to it? As conceived, the case method hinged on running students through at least six or seven cases per topic, precisely so that they would see how rules worked in different contexts. Further, six or seven cases provided students with an opportunity to distinguish between fact patterns and synthesize legal holdings, in short engage in legal reasoning. Finally, the Socratic method coincided closely with the case method, providing professors with a methodology for shepherding students through the different cases, until they came to a nuanced understanding of the rule in question.

None of the commentators seem to lament the reduced assignment of cases, nor do they appear to dispute my claim that casebooks have substituted other materials, many theoretical in nature. Professors Angela Harris and Cynthia Lee provide perhaps the most cogent rationale for this move, maintaining that theory should be included in the first year because it too is practical. They maintain that “practicing lawyers” do in fact need theoretical knowledge because they are “constantly in the business of pushing the law in new directions,” or alternately trying to “clarify” doctrinal questions “muddled by trying to move back to first principles.”⁴ To illustrate, Harris and Lee provide an example of California prosecutors who, in the 1980s, found themselves with extra funding to prosecute some but not all statutory rapists in their districts. In order to proceed, said prosecutors needed “to develop a theory of statutory rape that would allow them to decide which cases to prosecute.”⁵ While this is certainly a good example, it does not necessarily prove the point that young lawyers are “constantly” pushing law in new directions. Yet, I agree with Harris and Lee that to the extent theory is included, it should be subordinate to practical concerns. My only caveat would be

³ Lloyd Weinreb, *Teaching Criminal Law*, 7 OHIO ST. J. CRIM. L. 279, 280 (2009).

⁴ Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 262 (2009).

⁵ *Id.*

that before including a note on theory, it would be helpful to include more than simply one or two cases on the rule in question.

Incidentally, just because I see a greater need for cases, does not mean that I reject critical approaches to teaching law. On the contrary, I agree with Dean Paris that the inclusion of theory has no doubt led to "greater academic prestige" for law schools, provided law schools with "a seat at the grownups table"⁶ in terms of university politics, and undoubtedly attracted greater "student talent." My only quibble is that we need to move away from the masquerade of teaching theory in the garb of the case method. Here, the PhD holder in me comes out. Most PhDs would undoubtedly maintain that theory deserves its own methodology, its own set of texts (not casebooks), and ideally its own advanced level courses. What we have now, I fear, is a type of pedagogical Frankenstein, a little bit of theory, a smattering of cases, and some random normative questions designed to jump start class discussion.

Would abandoning such a methodological salad bore talented students, as Paris fears, perhaps even discourage them from continuing their legal study? Not necessarily. As I try to demonstrate in class, cases provide a window into the lives of average people, allowing students to see distinctions between rural and urban, religious and secular, liberal and conservative. Often, one or two contextual notes can greatly enrich the students' appreciation for a particular case, without then precluding the addition of other cases. In fact, such an Aristotelian, case-based approach to teaching law lends itself to highlighting aspects of local culture and local knowledge that more abstract, Platonic methods do not.

This is particularly true if cases are drawn from the same jurisdiction. In my course, I augment readings from a traditional casebook with cases drawn from Missouri, using them to illustrate not only the nuance of legal rules, but also the peculiar behavior of local juries and the regional nature of certain types of crime. Such an approach lends itself, in my opinion, to a Geertzian "thick description" of criminal life, one that appears to interest both the theoretical and practical-minded.

To commentators who worry that such a case-based approach ignores the codification of criminal law,⁷ I argue that it has been almost half a century since most states abandoned the common law in favor of versions of the Model Penal Code (MPC). This means that even though many casebooks continue to treat the MPC as a refreshing alternative to the common law, there is now in fact almost fifty years of common law interpreting the MPC in most states. Making students aware of this "new common law," as I term it, has reinvigorated the need for reading cases, particularly since most state courts have substantially altered MPC provisions based on local norms. At least that has been the case in Missouri.

⁶ Margaret L. Paris, *Four Good Things About Wechsler's Approach*, 7 OHIO ST. J. CRIM. L. 275, 278 (2009).

⁷ Dripps, *supra* note 2, at 257; Harris & Lee, *supra* note 4, at 265; Husak, *supra* note 2, at 271.

More supportive of the case method critique is Robert Weisberg, who asks the reasonable question whether the Bealian method of reading cases truly trained “the practitioner in the criminal law’s daily rounds,” or whether it too had a hidden agenda.⁸ Here, Weisberg points out the intriguing possibility that Beale’s compilation of appellate cases may have done relatively little towards preparing lawyers for “ground-level advocacy,” but sought instead to hone the skills of aspiring private attorneys, the very lawyers likely to spend the first part of their careers sifting through cases in law firm libraries.⁹

Weisberg’s point invites at least two possible responses. One, as he himself notes, many of the “ground-level advocacy” issues that he mentions have since been made the focus of criminal procedure, not criminal law. Two, even if Beale viewed criminal law to be sleazy and therefore did not want to train practitioners, his text nevertheless leaves one with a profound sense of how specific offenses, defenses, and so on operate in different factual contexts. To my mind, these are important concerns. They are important not only for students, but also practitioners, who currently spend much more time sifting through possible charges and defenses than they do litigating procedural matters. Indeed, this is one of Professor Donald Dripps’s primary points. He maintains that even “the simplest course of criminal conduct” under today’s codes can give “rise to a wide range of possible charges and penalties.”¹⁰ Further, “due process” in the “great majority” of cases today, argues Dripps, amounts to little more than charge bargaining between prosecutors and defense attorneys.¹¹ Though Dripps joins his colleagues in questioning whether “preparing students for actual practice even ought to be our primary goal,” his critique nevertheless indicates that understanding black-letter crime definitions remains as important as ever.¹²

Finally, a note on Wechsler. As I argue elsewhere, Wechsler was deeply engaged in legal reform and believed legal pedagogy to be part of that project.¹³ I do not believe that he had any more disdain for criminal lawyers than corporate ones. In fact, I suspect the opposite was true. As the Great Depression brought America to its knees, Wechsler viewed much of the problem to have originated from a lack of foresight on Wall Street and a lack of sympathy on the Supreme Court. Even though we are in a somewhat similar predicament today, I doubt that he would have singled out lawyers in the same manner. In fact, I think he would have been pleased with the manner in which civil rights has ennobled criminal law. I join the commentators in appreciating the significance of his contribution.

⁸ Weisberg, *supra* note 2, at 297.

⁹ *Id.*

¹⁰ Dripps, *supra* note 2, at 258.

¹¹ *Id.*

¹² *Id.* at 259.

¹³ Anders Walker, “Neutral” Principles: Rethinking the Legal History of Civil Rights, 1934–1964, 40 LOY. U. CHI. L.J. 385 (2009).